# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

WHOLE FOODS MARKET GROUP, INC.

and

Case 30-CA-16641-1

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 1444, CHARTERED BY THE UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

Paul Bosnac and Aaron Tharpe, Esqs., for the General Counsel. Michael Libowich and Kathleen M. McKenna, Esqs. (Proskauer Rose, LLP), of New York, New York, for Respondent.

#### **DECISION**

#### Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Madison, Wisconsin, on July 26, 2004. The original charge in this case was filed on November 7, 2003, by the United Food and Commercial Workers Union, Local 1444, AFL—CIO (the Union).¹ It alleged that Whole Foods Market Group, Inc. (Respondent) unlawfully assisted in the circulation of a decertification petition in violation of Section 8(1) and (3). The charge alleged that by such conduct Respondent rendered a free and fair election impossible. The charge was amended on December 11 to also allege that Respondent violated Section 8(a)(5) by thereafter withdrawing recognition from the Union and unilaterally changing the health and welfare benefits of the unit employees without first bargaining with the Union. On March 11, 2004, the Regional Director dismissed those portions of the charge alleging that Respondent unlawfully assisted in the circulation of the petition. The complaint,² issued on May 20, 2004, alleges that Respondent unlawfully withdrew recognition from the Union and changed the health insurance it provided to unit employee. Respondent filed a timely answer denying it had committed any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

<sup>&</sup>lt;sup>1</sup> All dates are in 2003 unless otherwise noted.

<sup>&</sup>lt;sup>2</sup> Later, other cases were consolidated with this case. However, the parties settled those other cases shortly before the trial opened and I granted the General Counsel's motion to sever those cases from this one.

## Findings of Fact

#### I. Jurisdiction

Respondent, a corporation, has been engaged in the sale of grocery and sundry items at its facility in Madison, Wisconsin, where it annually receives gross revenues in excess of \$500,000 and purchases and receives goods and materials valued in excess of \$50,000 from suppliers located outside the State of Wisconsin. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. Alleged Unfair Labor Practices

As indicated, Respondent operates a grocery store. Adam Mitchell is Respondent's store team leader; he is responsible for the day-to-day operations of the store. On June 5, 2002, the Union filed a petition to represent Respondent's employees. Pursuant to a stipulated election agreement an election was held on July 12, 2002. The Union won the election 65 to 54 and after the Board overruled objections to the election the Union was certified on September 25, 2002. Thereafter the parties began bargaining for a collective-bargaining agreement.

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On October 14 an employee filed a decertification petition. The parties again signed a stipulated election agreement that set an election for November 17; the voter eligibility date was October 26. However, as indicated above, on November 7 the Union filed the nonmeritorious portion of the charge in this case and on that same day the Regional Director postponed the election until after the charge was resolved. On November 11 Respondent advised the Union by letter that it had received objective evidence that a majority of unit employees no longer wished to be represented by the Union and that pursuant to *Levitz Furniture Co.*, 333 NLRB 717 (2001), Respondent was withdrawing recognition from the Union.

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By November 4 bargaining unit employees presented Mitchell with 12 sheets of paper bearing 84<sup>3</sup> signatures. Seven of those sheets had the following heading:

## PETITION FOR DECERTIFICATION (RD)-REMOVAL OF REPRESENTATIVE

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The undersigned employees of Whole Foods Market Madison Wisconsin, constituting 30% or more of the bargaining unit represented by the UFCW-local 1444, no longer wish to be represented by UFCW-1444. The undersigned employees hereby petition the National Labor Relations Board to hold a decertification election to determine whether the majority also no longer wish to be represented by this union.

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<sup>&</sup>lt;sup>3</sup> There was some confusion at the hearing whether there were 83 or 84 signatures. On the copy of the petition submitted by Respondent during the investigation of this case and on the copy of the petition stipulated into the record there were only 83 names. However, Mitchell explained that he had a copy of the petition that included the signature of 84th person—employee Dan Yoder. Based on my observation of Mitchell's demeanor I have determined to credit his testimony. Mitchell's testimony was corroborated by a copy of the petition that included Yoder's signature and that was used by Respondent in counting the names on the petition. I conclude that Respondent's failure to submit the copy of the petition with Yoder's signature during the investigation and for the stipulation was the result of inadvertent error.

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The petition then contained the following spaced about an inch apart for the remainder of the 81/2 by 12 sheet of paper.

Name (Print)

Signature

Date

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The remaining five sheets of paper contained only following at spaces about one inch apart for the entire sheet.

Name (Print)

Signature

Date

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These petitions were given to Mitchell in segments over several weeks, but whenever he was given them they always had the fuller caption on top.

Tana Bronk was among the employees who solicited other employees to sign the petition. At trial Bronk testified she told the employees that the petition was to get an election to hopefully remove the Union and that if enough employees signed the petition that maybe the Union could be removed without an election. The General Counsel relies on the affidavit that she gave during the pretrial investigation as evidence that the petition is invalid. In that affidavit Bronk stated, "I explained it was a petition to get a vote." I note that Bronk's affidavit does not indicate that that was the *only* explanation Bronk gave to the petition signers. I credit Bronk's testimony at the hearing that she gave the fuller explanation of the purpose of the petition to the petition signers; she impressed me a truthful witness. Also at trial Bronk testified that she believed that the copy of the petition she used had the full heading on it as described above and that she never asked employees to sign a "blank page"; that it was "definitely a petition page." In Bronk's pretrial affidavit she stated: "I would take a page of the petition either Mike or Angelo or take a blank page I had at home to get signatures." But she credibly explained at trial that she had copies of the printed petition form without signatures and that is what she meant when she referred to as a "blank page" in her affidavit.

Mitchell asked Paul Sigmund, associate store team leader, to compare the signatures on the petition with the signatures that were kept in the employees' personnel files. Sigmund concluded that the signatures were authentic.<sup>4</sup> In examining the signatures on the list Respondent determined that 13 were from persons not in the unit, were duplicates, or had left the unit by November 11. So Respondent concluded that 71 unit employees had signed the petition in a unit of, according to Respondent, 139 employees.

The parties disagree as to the size of the unit on November 11; the General Counsel contends that there were 141 employees while Respondent argues that there were only 139. The voter list prepared by Respondent listed 141 unit employees as of October 26. Denise Washburn's name appeared on the *Excelsior* list but she was separated from Respondent on October 24. Anna Buol's name also appeared on the *Excelsior* list but she was separated from Respondent on October 30. So I conclude that there were 139 unit employees as of November 11.<sup>5</sup>

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<sup>&</sup>lt;sup>4</sup> The General Counsel argues that Respondent failed to prove that the signatures were authentic. But the General Counsel did not object to the nature of this testimony and I consider that testimony to be substantial and sufficient to support my conclusion.

<sup>&</sup>lt;sup>5</sup> I reject the General Counsel's argument that Respondent has failed to establish the size of the unit at the time it withdrew recognition.

The parties also disagree as to the number of valid signatures of unit employees on the petition. The General Counsel asserts that there are 70 while Respondent contends that there are 71. Martha White Heffner signed the petition and was counted by Respondent as an employee who no longer wanted to be represented by the Union, yet her name did not appear on the Excelsior list. This was due to the fact that effective October 27 she moved from being a full-time shift manager—a nonunit position—to assistant front-end team leader—a unit position.<sup>6</sup> So I conclude that 71 unit employees signed the decertification petition prior to November 11.7

On November 18 Respondent announced to the employees that effective January 1, 2004, the employees would be covered by Respondent's national benefit health insurance plan.

## III. Analysis

In Allentown Mack Sales & Service v. NLRB, 522 U.S. 359 (1998), the Supreme Court revised the standard that the Board had used under Celanese Corp., 95 NLRB 664 (1951), for allowing employers to withdraw recognition from a labor organization. The Supreme Court held that the standard was that an employer must have "reasonable uncertainty" rather than a "goodfaith doubt" that the labor organization no longer had majority support of the employees before the employer can withdraw recognition. After that decision the Board issued a decision in Levitz Furniture Co., 333 NLRN 717 (2001), wherein it decided to abandon both the "reasonable uncertainty" and "good-faith doubt" standards and instead held that employers must show that a union has "actually lost" the support of a majority of employees in the recognized unit.

I have concluded above that at time Respondent withdrew recognition 71 of the 139 employees had signed the petition. But the General Counsel argues that the petition itself is not indicative of the fact that the Union had lost majority support. First, the General Counsel argues that the caption used on the petition is ambiguous. That language, again, is:

> The undersigned employees of Whole Foods Market Madison Wisconsin, constituting 30% or more of the bargaining unit represented by the UFCW-local 1444, no longer wish to be represented by UFCW 1444. The undersigned employees hereby petition the National Labor Relations Board to hold a decertification election to determine whether the majority also no longer wish to be represented by this union.

I disagree. While the language does indicate that the employees were seeking an election, it also unequivocally states that the signers "no longer wish to be represented by UFCW-1444." In context a reasonable employee reading the entire language would conclude that petition indicated that the signers no longer supported the Union and that an election could be held to establish the fact that a majority of the employees likewise no longer supported the Union. The General Counsel cites a number of cases to support its position. In Pic Way Shoe Mart, 308 NLRB 84 (1992), the caption read, in pertinent part, "Our contract has just expired & we would like to have a vote on whether to have a union or not." In contrast to the language in this case, the language in Pic Way gave no indication that the employees signing the petition no

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<sup>&</sup>lt;sup>6</sup> I have considered the fact that Heffner's name is listed on a document as being in the supervisory position as of November 13, but I accept Mitchell's unrebutted testimony that the document was not accurate.

<sup>&</sup>lt;sup>7</sup> I therefore reject the General Counsel's argument that Respondent has failed to show that these employees were unit employees.

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longer supported the Union. For the same reason *Phoenix Pipe & Tube Co.*, 302 NLRB 122 (1991), enf. 955 F.2d 852 (3d Cir. 1991), also cited by the General Counsel, is distinguishable.

The General Counsel also contends that petition is invalid because "Respondent did not attempt to determine if any of the signatory employees signing on a blank page did so with no captioned page attached." But there is no direct evidence that any employee signed a blank page without an accompanying caption page and I decline to make any such inference.

I therefore concluded that Respondent has established that the Union had lost the support of a majority of the employees in the unit on the day it withdrew recognition.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

following recommended<sup>8</sup>

ORDER

The complaint is dismissed.

Dated, Washington, D.C., October 13, 2004.

William G. Kocol
Administrative Law Judge

 <sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.